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AMEMBASSY BOGOTA
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C O N F I D E N T I A L SECTION 01 OF 04 CARACAS 003383

STATE PLEASE PASS TO USTR-KLEZNY, BHARMON, CPIERANGELO

E.O. 12958: DECL: 10/14/09
TAGS: ECON, ETRD, EINV, KIPR, USTR, WTRO, VE
SUBJECT: ECONOMIC ISSUES IN VENEZUELAN DRAFT CONSTITUTION

CLASSIFIED BY DCM NANCY MASON. REASON 1.5 (B) AND (D).

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SUMMARY:

1. (U) THE LATEST DRAFT CONSTITUTION IS A LENGTHENED VERSION OF ITS 1961 PREDECESSOR WITH SOME PROBLEMATIC ADDITIONS. IT IS ALSO VERY MUCH A WORK IN PROGRESS. THE DRAFT GUARANTEES THE RIGHT TO PRIVATE PROPERTY. IT DOES NOT FORBID INTERNATIONAL ARBITRATION, BUT ALSO DOES NOT ROBUSTLY GUARANTEE THE SAME. IT GUARANTEES IPR, BUT ITS EXPANDED DEFINITION OF SOVEREIGNTY COULD CAUSE PROBLEMS IN THIS AREA. THE DRAFT SETS LOFTY GOALS FOR "SOCIAL RIGHTS." IT REASSERTS THE PRINCIPLE OF "RETROACTIVITY" IN SEVERANCE PAY. IT CONTAINS POTENTIALLY PROBLEMATIC ITEMS, INCLUDING A PROVISION THAT WOULD GIVE AGRICULTURAL WORKERS THE

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ALAN H FLANIGAN
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RIGHT TO OWN THE LANDS THEY WORK. THE NEW DRAFT GIVES THE STATE EXTENSIVE POWERS -- INCLUDING THE RIGHT TO "DE-STIMULATE THE HOLDING OF UNUSED LANDS" -- TO PROMOTE RURAL DEVELOPMENT. THE CENTRAL GOVERNMENT ALSO SEEMS TO ACQUIRE THE POWER TO REVIEW PUBLIC BUDGETS AT ALL LEVELS. END SUMMARY.

2. (U) THE ENTIRE TEXT IS AVAILABLE AT THE FOLLOWING WEB ADDRESS
-- [HTTP://POLITICA.EUD.COM/INFORMESPECIAL/ANC/TITULOIV.HTML](http://politica.eud.com/informespecial/anc/tituloiv.html)

THE CONSTITUTIONS COMPARED

3. (U) A COMPARISON OF THE ECONOMIC SECTIONS OF THE 1961 VENEZUELAN CONSTITUTION AND THE MOST RECENT DRAFT AVAILABLE FROM THE CONSTITUTIONAL ASSEMBLY (ANC) SHOWS MANY CONSISTENCIES ALONG WITH SEVERAL POTENTIALLY IMPORTANT CHANGES. IT SETS THE STAGE

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FOR AN IMPORTANT AND VIGOROUS PUBLIC DEBATE. THE AREAS OF CONCERN ON THE ECONOMY ARE THE FOLLOWING:

PRIVATE INITIATIVE AND PRIVATE PROPERTY

4. (U) ARTICLE 116 OF THE DRAFT CONSTITUTION STATES THAT THE GOV WILL "PROMOTE PRIVATE INITIATIVE STIMULATING THE CREATION OF WEALTH AND GUARANTEEING THE FREEDOM TO WORK, TO HAVE A BUSINESS, AND TO ENGAGE IN COMMERCE AND INDUSTRY...." HOWEVER, STATE SUPPORT FOR PRIVATE INITIATIVE WILL NOT PREJUDICE THE STATE'S ABILITY "TO DICTATE MEASURES TO PLAN, RATIONALIZE AND REGULATE THE ECONOMY AND TO PROMOTE THE INTEGRAL DEVELOPMENT OF THE COUNTRY." THIS WORDING IS VERY CLOSE TO THE SAME BROAD MANDATE FOR PUBLIC PLANNING PROVIDED FOR IN THE 1961 CONSTITUTION.

5. (U) ARTICLE 118 GUARANTEES CITIZENS THE RIGHT TO "ENJOY," "TO USE," AND "TO DISPOSE OF" THEIR PROPERTY. THE RIGHT "TO DISPOSE OF" ONE'S PROPERTY -- WHICH APPEARS IN THE 1961 CONSTITUTION -- WAS DROPPED IN EARLIER DRAFTS, CAUSING SOME CONCERNS IN THE BUSINESS COMMUNITY. ITS REAPPEARANCE INDICATES THAT THOSE CONCERNS WERE NOTED AND ANSWERED. THE NEW DRAFT ALSO ALLOWS FOR LIMITS ON THE RIGHT OF PRIVATE PROPERTY IN CASES OF "GENERAL INTEREST" OR "SOCIAL UTILITY," A PROVISION THAT WAS IN THE 1961 CONSTITUTION AND THAT WOULD APPEAR TO CORRESPOND TO THE GOVERNMENT'S RIGHT TO "EMINENT DOMAIN" IN THE U.S.

ARBITRATION: LANGUAGE REPEATED FROM 1961 CONSTITUTION

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6. (U) EARLIER DRAFTS OF THE CONSTITUTION CONTAINED LANGUAGE THAT ALL DISPUTES BETWEEN INVESTORS AND THE VENEZUELAN STATE HAD TO BE RESOLVED IN VENEZUELAN COURTS, A PROVISION THAT WOULD HAVE BARRED INTERNATIONAL ARBITRATION. THE PRESENT DRAFT LEAVES ROOM FOR INTERNATIONAL ARBITRATION BY ADOPTING THE LANGUAGE OF THE 1961 CONSTITUTION WHOLESALE (ARTICLE 127). ARTICLE 166 SAYS THAT CONTRACTS REGARDING "THE PUBLIC INTEREST" (I.E. CONTRACTS WITH THE STATE OR WITH STATE ECONOMIC ENTITIES) WILL AUTOMATICALLY INCORPORATE A CLAUSE THAT WILL STATE THAT CONFLICTS OVER SUCH CONTRACTS WILL BE RESOLVED IN VENEZUELAN COURTS, "IF SUCH [AN APPROACH] DOES NOT CONTRADICT THE NATURE OF SAID AGREEMENT." SINCE 1961, THIS LAST PHRASE HAS BEEN INTERPRETED TO ALLOW ARBITRATION TO BE BUILT INTO PUBLIC INTEREST CONTRACTS. THIS PROVISION COVERS ONLY CONTRACTS THAT TOUCH ON "THE PUBLIC INTEREST." PURELY COMMERCIAL CONTRACTS BETWEEN PRIVATE ENTITIES WOULD NOT BE FORCED INTO LOCAL COURTS OR REQUIRE SPECIAL PROVISIONS GUARANTEEING ACCESS TO ARBITRATION. NOTE: THE ABOVE INTERPRETATION WAS CONFIRMED BY DR. FARID ANTAKLY, A PROMINENT CARACAS ATTORNEY AND OFFICER OF THE VENEZUELAN-AMERICAN CHAMBER OF COMMERCE (VENAMCHAM) ON OCTOBER 15. END NOTE.

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C O N F I D E N T I A L SECTION 02 OF 04 CARACAS 003383

STATE PLEASE PASS TO USTR-KLEZNY, BHARMON, CPIERANGELO

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INTELLECTUAL PROPERTY

8. (U) ARTICLE 121 OF THE DRAFT CONSTITUTION SAYS THAT THE STATE WILL PROTECT INTELLECTUAL PROPERTY IN SCIENTIFIC INVENTIONS, LITERARY AND ARTISTIC PRODUCTIONS, INVENTIONS, DENOMINATIONS, TRADEMARKS, AND SLOGANS. THIS LANGUAGE IS ALMOST THE SAME AS THE 1961 CONSTITUTION. THE DRAFT ADDS THAT "FOR REASONS OF SOCIAL INTEREST" THE STATE CAN CREATE EXCEPTIONS TO IPR PROTECTION. "SOCIAL INTEREST" IS NOT DEFINED.

9. (U) COMMENT: THIS SECTION REPRESENTS A CONSIDERABLE IMPROVEMENT OVER RECENT DRAFTS OBTAINED BY EMBASSY THAT HAD COMMITTED THE STATE TO PROTECTING KNOWLEDGE ACQUIRED BY VENEZUELANANS WHO HAD WORKED ABROAD AND THEN RETURNED TO THEIR COUNTRY, A CLAUSE THAT COULD HAVE OPENED THE DOOR TO INDUSTRIAL PIRACY. END COMMENT.

SOVEREIGNTY EXTENDED AND ENHANCED

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10. (U) THE DEFINITION OF VENEZUELA'S SOVEREIGN TERRITORY IN THE PROPOSED CONSTITUTION IS MORE COMPREHENSIVE THAN IN THE 1961 VERSION. ARTICLE 11 OF THE NEW DRAFT STATES THAT "VENEZUELA EXERCISES EXCLUSIVE RIGHTS" TO ITS TERRITORIES INCLUDING "THE NATURAL ENVIRONMENT AND ALL NATURAL RESOURCES THAT ARE FOUND THEREIN, INCLUDING THE GENETIC RESOURCES OF MIGRATORY SPECIES, THE PRODUCTS THAT ARE DERIVED FROM THOSE SPECIES, AND THE INTANGIBLE COMPONENTS THAT, AS THE RESULT OF NATURAL CAUSES, ARE LOCATED IN VENEZUELAN SPACE." IN ADDITION, THE DRAFT SAYS VENEZUELA EXERCISES RIGHTS TO THE AIR SPACE ABOVE THE COUNTRY AND MAINTAINS "THOSE [RIGHTS] THAT MIGHT BE DERIVED FROM THE USE OF [VENEZUELA'S] GEOSTATIONARY ORBIT AND ITS ELECTROMAGNETIC SPECTRUM."

EXPANDED SOCIAL RIGHTS

11. (U) THE DRAFT CONSTITUTION OFFERS SPECIFIC ECONOMIC RIGHTS LIKE: THE RIGHT TO WORK "IN DIGNIFIED CONDITIONS," A PROPOSAL THAT INCLUDES A PROMISE THAT THE STATE WILL ADOPT, "IN CONFORMITY WITH THE LAW," NECESSARY MEASURES TO BRING ABOUT FULL EMPLOYMENT (ARTICLE 91); THE RIGHT TO "A DIGNIFIED SALARY" THAT WOULD PERMIT A WORKER TO COVER HIS/HER OWN NECESSITIES AS WELL AS THE "MATERIAL, SOCIAL AND CULTURAL NEEDS" OF HIS/HER FAMILY (ARTICLE 95); AND THE RIGHT TO DIGNIFIED HOUSING FOR A WORKER AND HIS/HER FAMILY. SUCH HOUSING SHOULD BE SECURE, COMFORTABLE, HYGIENIC AND "OF APPROPRIATE DIMENSIONS, WITH ACCESS TO ESSENTIAL SERVICES." FURTHER, THE STATE COMMITS ITSELF TO DEVELOP A HOUSING POLICY THAT WILL GUARANTEE "A HABITAT THAT WILL HUMANIZE RELATIONS

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WITHIN FAMILIES, NEIGHBORHOODS AND COMMUNITIES" (ARTICLE 103).

12. (C) COMMENT: THE LANGUAGE USED IN THIS SECTION IS GOAL-ORIENTED AND SOMEWHAT UTOPIAN. POTENTIAL PROBLEMS COME, NOT FROM THE LANGUAGE ITSELF, BUT IN WHAT THESE CONSTITUTIONAL COMMITMENTS MIGHT PORTEND -- IF ANYTHING -- FOR FUTURE GOV ECONOMIC POLICIES.

BACK TO THE FUTURE ON SEVERANCE PAY

13. (U) SEVERANCE PAY CONSTITUTES AN EGREGIOUS EXAMPLE OF THE VENEZUELAN CONSTITUTION DRAFTERS' TENDENCY TO INCORPORATE LEGISLATIVE MATERIAL INTO THE PROPOSED CONSTITUTION'S TEXT. ARTICLE 96 OF THE DRAFT CONSTITUTION STATES THAT SEVERANCE PAY

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WILL BE CALCULATED "ACCORDING TO TIME IN SERVICE AND IN CONFORMITY WITH [A WORKER'S] LAST SALARY." UNDER THIS, PUBLIC AND PRIVATE SECTOR WORKERS WHO LEAVE THEIR JOBS WILL RECEIVE ONE MONTH'S PAY FOR EVERY TWELVE MONTHS THEY HAVE WORKED, AND THE AMOUNT OF THAT PAYMENT WOULD BE CALCULATED ACCORDING TO A GIVEN WORKER'S HIGHEST SALARY IN HIS/HER JOB. THIS PRINCIPLE IS KNOWN AS "RETROACTIVITY," AND IT WAS ABOLISHED BY PRESIDENT CALDERA'S GOVERNMENT IN 1997 BECAUSE IT PROVED FINANCIALLY BURDENSOME FOR BOTH THE PUBLIC AND PRIVATE SECTORS.

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C O N F I D E N T I A L SECTION 03 OF 04 CARACAS 003383

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14. (U) COMMENT: THE CALDERA GOVERNMENT ABANDONED
"RETROACTIVITY" AND SUBSTITUTED A NEW CALCULATION BASED ON
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WORKER'S ACTUAL WAGES. THE DRAFT CONSTITUTION ATTEMPTS TO
SANCTIFY THIS BUDGET-BUSTING PRACTICE AT THE CONSTITUTIONAL
LEVEL. BOTH THE PRESIDENT'S WIFE, AN ANC MEMBER, AND THE FINANCE

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MINISTER HAVE SPOKEN AGAINST INCLUDING RETROACTIVITY IN THE CONSTITUTION. WHILE THE IDEA IS PRESENT IN THIS LATEST DRAFT, THE DEBATE IS FAR FROM OVER. END COMMENT.

THE SOCIO-ECONOMIC SYSTEM: THE RADICALS' GRAB BAG?

15. (C) THIS SECTION INCLUDES SOME OF THE MOST PROBLEMATIC AND ECCENTRIC PROPOSALS IN THE NEW CONSTITUTION, AND APPEARS TO HAVE FUNCTIONED AS A SORT OF GRAB BAG FOR RADICAL IDEAS.

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16. (U) ARTICLE 357 SAYS "ALL AGRICULTURAL WORKERS HAVE THE RIGHT TO THE LAND [LITERALLY "THE PROPERTY OF THE EARTH"] THAT THEY WORK." THE SAME ARTICLE ALSO SAYS THE STATE WILL PROMOTE RURAL DEVELOPMENT AND WILL PROVIDE FOR THE PLANNING, PRODUCTION, INDUSTRIALIZATION AND COMMERCIALIZATION OF AGRICULTURAL AND FORESTRY PRODUCTS.

17. (C) COMMENT: THE PROMISE THAT AGRICULTURAL WORKERS SHOULD OWN THE LANDS UPON WHICH THEY WORK SEEMS ESPECIALLY INFLAMMATORY IN A COUNTRY THAT SUFFERED A SERIES OF RURAL LAND SEIZURES IN THE MONTHS FOLLOWING THE LAST PRESIDENTIAL ELECTION. THIS SECTION
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HAS NOT YET RECEIVED MUCH PUBLIC ATTENTION, BUT WE EXPECT IT TO BECOME VERY CONTROVERSIAL IN THE DEBATES SET TO START NEXT WEEK.
END COMMENT.

18. (U) ARTICLE 359 REPEATS THE 1961 CONSTITUTION'S OBJECTIONS TO LATIFUNDIA, BUT GOES FURTHER IN ITS DISCUSSION OF "UNUSED TERRITORY." IT STATES THAT, "THE LAW WILL DE-STIMULATE THE HOLDING OF UNUSED LANDS AND WILL DISPOSE OF THOSE LANDS IN A WAY CONDUCIVE TO THEIR TRANSFORMATION INTO ECONOMICALLY PRODUCTIVE UNITS AND THEIR EMPLOYMENT IN AGRICULTURE."

19. (C) COMMENT: THE LANGUAGE IN THE PRESENT DRAFT WOULD APPEAR TO OPEN THE DOOR TO THE TAXATION OR PERHAPS EVEN THE SEIZURE OF UNUSED LANDS BY THE STATE WITH THE GOAL OF PUTTING THOSE LANDS TO USE. END COMMENT.

20. (U) ARTICLE 361 SAYS THAT THE STATE WILL SUPPORT SMALL AND MEDIUM ENTERPRISES AS WELL AS FAMILY BUSINESSES AND MICRO-ENTERPRISES WITH THE IDEA OF PULLING WORKERS FROM THE INFORMAL

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SECTOR INTO THE LEGAL ECONOMY. COMMENT: CHAVEZ HAS FREQUENTLY REFERRED TO SPECIAL MICRO-ENTERPRISE LENDING PROGRAMS IN HIS PUBLIC ADDRESSES, AND HIS GOVERNMENT HAS SET ASIDE FUNDS FOR THIS. HE OFTEN PRESENTS MICRO-ENTERPRISES AS THE SOLUTION TO UNEMPLOYMENT WHEN HE RECEIVES CALLS FROM THE JOBLESS ON HIS RADIO TALK SHOW, "ALO PRESIDENTE." EXPERIENCE FROM OTHER COUNTRIES INDICATES THAT FOR MICRO-ENTERPRISES TO SUCCEED, THE TERMS OF CREDIT HAVE TO BE CAREFULLY WORKED OUT AND TECHNICAL EXPERTISE HAS TO BE AVAILABLE. POST IS PLANNING TO OBSERVE THESE PROGRAMS IN ACTION. END COMMENT.

21. (U) ARTICLE 360 EXTENDS STATE PROTECTION TO "ARTESANAL
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FISHING VILLAGES" IN THE NAME OF NATIONAL SELF-SUFFICIENCY IN FOOD. SIMILARLY, ARTICLE 357 COMMITS THE STATE TO POLICIES THAT WILL PROMOTE FOOD SELF-SUFFICIENCY FOR VENEZUELA AS A MATTER OF NATIONAL SECURITY, A PROVISION LIKELY TO BE CITED TO JUSTIFY PROTECTIONIST MEASURES.

PROVISIONS ON BALANCING THE BUDGET

22. (U) ARTICLE 364 OF THE LATEST DRAFT CONSTITUTION CONTAINS THE VENEZUELAN VERSION OF A BALANCED BUDGET AMENDMENT. IT SAYS THAT "THE MULTI-YEAR BUDGET OF ORDINARY INCOME MUST BE SUFFICIENT TO COVER THE ORDINARY EXPENDITURES OF THE STATE, IN ACCORDANCE WITH THE LAW." THIS IS IN KEEPING WITH PRESIDENT CHAVEZ OWN OFT- STATED DISLIKE OF DEFICITS. ARTICLE 366 SAYS IT IS THE RESPONSIBILITY OF THE EXECUTIVE TO SEE THAT "FISCAL EQUILIBRIUM" IS MAINTAINED IN THE PUBLIC SECTOR. THE EXECUTIVE WILL DO THIS BY MAKING EXPLICIT THE LONG TERM GOALS OF FISCAL POLICY AND EXPLAINING HOW THOSE GOALS ARE TO BE MET. AT THE END OF EACH TRIMESTER, THE EXECUTIVE IS TO REPORT TO CONGRESS ON THE STATE OF PUBLIC FINANCE AND ON ANY DEVIATIONS FROM SOUND BUDGETARY PRACTICE THAT MAY HAVE OCCURRED.

23. (C) COMMENT: THE LANGUAGE USED IN ARTICLE 366 GIVES THE

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EXECUTIVE AUTHORITY OVER "PUBLIC FINANCE." PRESUMABLY, THIS
INCLUDES STATE AND MUNICIPAL GOVERNMENTS. THIS TRACKS WITH
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PRESIDENT CHAVEZ' RECENT STATEMENT IN HIS PUBLIC ADDRESS ON THE
BUDGET THAT THE EXECUTIVE SHOULD HAVE GREATER CONTROL OVER HOW
STATE AND MUNICIPAL GOVERNMENTS SPEND MONIES THEY RECEIVE FROM
THE CENTRAL GOVERNMENT. WHILE THIS MIGHT ENCOURAGE FISCAL
RESPONSIBILITY, TOO-CLOSE SCRUTINY OF STATE AND LOCAL BUDGETS BY
THE EXECUTIVE COULD ALSO UNDERCUT THE VERY HEALTHY
DECENTRALIZATION THAT VENEZUELAN POLITICS HAS UNDERGONE IN RECENT
YEARS. IN A SIMILAR VEIN, THE NEW DRAFT ALSO CALLS FOR THE
CONGRESS TO REVIEW THE CENTRAL BANK'S BUDGET, AN ADDITIONAL
MEASURE THAT ENHANCES CENTRAL GOVERNMENT CONTROL OVER PUBLIC
FINANCES. (THE CENTRAL BANK'S AUTONOMY REMAINS GUARANTEED.)
CONSEQUENTLY, THE APPLICATION OF THE BUDGETARY SECTIONS OF THE
CONSTITUTION WILL BEAR CLOSE WATCHING FOR ITS EFFECT ON BOTH
SEPARATION OF POWERS AND DECENTRALIZATION. END COMMENT.

FINAL COMMENT:

24. (U) THE NEW CONSTITUTIONAL DRAFT IS THE STARTING POINT FOR
WHAT WILL BE, NO DOUBT, A VIGOROUS DEBATE ON VENEZUELA'S
FUNDAMENTAL CHARTER STARTING NEXT WEEK.

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